IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

JUDITH A. BRYANT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION**
	)	**No. 01-2390-CM**
	)	
FARMERS INSURANCE EXCHANGE,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

Pending before the court is plaintiff Judith A. Bryant's Motion to Alter Judgment (Doc. 67). As set forth below, plaintiff's motion is denied.

I. Background

In this case, plaintiff contended that defendant discriminated against her on the basis of age and gender when defendant terminated her employment, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* On May 14, 2003, this court granted summary judgment in favor of defendant on all of plaintiff's claims. Plaintiff requests the court to alter or amend this judgment.

II. Legal Standard

Whether to grant or deny a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e) is committed to the court's discretion. *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130

F.3d 1381, 1386 (10th Cir. 1997); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir. 1988). In exercising that discretion, courts in general have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Marx v. Schnuck Mkts., Inc.*, 869 F. Supp. 895, 897 (D. Kan. 1994) (citations omitted); D. Kan. Rule 7.3 (listing three bases for reconsideration of order). "Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position on the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination. . . . A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Sithon Maritime Co. v. Holiday Mansion*, 177 F.R.D. 504, 505 (D. Kan. 1998) (citations omitted).

III. Analysis

Plaintiff claims that, in its May 14, 2003 Memorandum and Order granting defendant's motion for summary judgment (hereinafter "May 14 Order"), the court erred by: (1) mischaracterizing facts as uncontroverted; (2) finding plaintiff had failed to put forth sufficient evidence of pretext, where plaintiff alleged defendant manipulated files related to plaintiff's performance; and (3) finding plaintiff had failed to put forth sufficient evidence of pretext, where plaintiff submitted statistical evidence she had compiled and analyzed herself in an attempt to show that defendant's statistical evidence related to plaintiff's performance was unworthy of credence. As discussed below, applying the Rule 59(e) standard, the court believes plaintiff has not set forth a basis upon which the court should alter its May 14 Order.

A. Alleged Mischaracterization of Facts

First, plaintiff states that the court characterized facts located on pages 2 through 5 of the May 14 Order as uncontroverted, when plaintiff had controverted the facts in her Memorandum in Opposition to Defendant's Motion for Summary Judgment. Plaintiff references paragraphs 21, 24, 26, 45, 53, 54, 67, and 68 of defendant's statement of uncontroverted facts.

In its May 14 Order, the court examined the facts referenced by plaintiff as "[t]he history of **defendant's evaluation** of plaintiff's performance as manager of RPI in light of RPI's compliance with defendant's standards . . . ." (May 14 Order at 2) (emphasis added). In response to the facts alleged at paragraphs 21, 24, 26, 45, 53, 54, 67, and 68, plaintiff stated, in her response to defendant's motion for summary judgment, that she "concede[d] that the audit results set forth in these paragraphs correctly state the results computed by her supervisor, Jack Honore." (Pl.'s Mem. Opp. at 2). Plaintiff also stated that she had "contest[ed] the accuracy of these results because of the manipulation of the files audited by Honore to create false audit numbers," and that "the so-called standards were never intended to be mandatory achievement levels." (*Id.*)

The court finds plaintiff's criticism does not warrant alteration of the May 14 Order under Rule 59(e). As specifically stated by the court, the court set forth the facts alleged at paragraphs 21, 24, 26, 45, 53, 54, 67, and 68 in the context of discussing defendant's evaluation of plaintiff's performance. Plaintiff did not dispute that such statistics were in fact those provided by defendant. As such, they were properly characterized as uncontroverted to the extent the statistics presented **defendant's evaluation** of plaintiff's performance. The court fully considered plaintiff's arguments regarding the alleged pretextual nature of the statistics later in the opinion, as discussed below.

2. Alleged Error in Construing Evidence of File Manipulation

Plaintiff contends the court should have found that plaintiff presented sufficient evidence to show that defendant's justification for firing plaintiff - her alleged substandard performance - was pretextual, because employees of defendant pulled plaintiff's files from the audit.

The court believes its analysis of this issue in the May 14 Order was a correct application of the law to the facts, and plaintiff's arguments do not meet Rule 59(e)'s standard of showing "clear error" or "manifest injustice." In the court's view, no further discussion is needed. However, to make its ruling particularly clear to the parties, the court will continue.

In support of the file-pulling allegations, plaintiff offered her own testimony and that of Jeff Salsbury. With regard to plaintiff's testimony, plaintiff provided her own affidavit, in which she stated "[a]lthough I was not aware of it at the time, I have learned since my discharge that Nagle was manipulating the files which were being audited by Honore." (Pl.'s Decl. ¶ 38). Plaintiff then repeated the statements set forth in Mr. Salsbury's affidavit. The court concluded that plaintiff's affidavit could not be considered upon summary judgment, because it was not based upon her personal knowledge: "To survive summary judgment, nonmovant's affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient." *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) (citation omitted), *quoted in* May 14 Order at 12.

The only evidence properly before the court was that provided by Mr. Salsbury, who stated: (1) he knew of "a number of audits" conducted by Mr. Honore and Mr. Nagle, (Pl.'s Resp. Attach. 30 at ¶ 8); (2) that he "personally observed some manipulation of the audit files before the files were audited," (*Id.*) ; (3) that he observed Mr. Nagle instructing employees to pull certain files, and that he did not know what Mr.

Nagle did with the files; and (4) that he "thought it was strange that we were directed to pick out the 'good' files from the list of files to be audited" and that "handpicking the files made [him] feel very uneasy." (*Id.*). Upon full consideration of Mr. Salsbury's affidavit, the court found that there were "no facts before the court indicating which files were pulled, whether they concerned plaintiff, how the pulled files were used, and whether they were in fact excluded from the audit." (May 14 Order at 12).

As the court noted on page 6 of the May 14 Order, to survive summary judgment, the non-moving party may not "rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988). Based upon the statements of Mr. Salsbury, no rational jury could have concluded that defendant had manipulated plaintiff's files. It was plaintiff's burden to present evidence showing that defendant's proffered reason for terminating plaintiff was pretextual. The court's characterization of plaintiff's evidence was neither clearly erroneous nor manifestly unjust.

3. Alleged Error in Excluding Statistical Evidence Compiled by Plaintiff

Finally, plaintiff states the court erred by failing to find that plaintiff had presented sufficient evidence of pretext, when plaintiff presented a competing analysis of the audit results allegedly relied upon by defendant in its decision to terminate plaintiff's employment.

Plaintiff claims in the Motion to Alter Judgment that the court should not have *sua sponte* excluded this evidence as being (1) outside plaintiff's personal knowledge, and therefore improper evidence supporting summary judgment under Rule 56(e); and (2) opinion testimony outside the personal knowledge of plaintiff, and therefore improper expert testimony.

First, plaintiff contends that the court was "not free to reject *sua sponte* evidence presented in opposition to a motion for summary judgment," and that the court "may not ignore evidentiary material which shows the existence of a genuine issue of material fact for trial." (citing *McCormick on Evidence* § 55 at 144 (3d ed. 1984); 88 C.J.S. § 253 (2001)). Rule 56(e) places upon the court the obligation to consider all affidavits in compliance therewith in ruling upon a summary judgment motion. Importantly, the rule provides that:

> [S]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant it competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e). As the Tenth Circuit has stated, in ruling on a motion for summary judgment, "the court should accept as true all material facts asserted **and properly supported** in the summary judgment motion. But only if those facts entitle the moving party to judgment as a matter of law should the court grant summary judgment." *Reed v. Bennett*, 312 F.3d 1190, 1194 (10th Cir. 2002) (citations omitted) (emphasis added).

This court, and other courts, have properly examined affidavits to determine their compliance with Rule 56(e), and have declined to consider affidavits that are noncompliant, even if no party objects to their admissibility. In *Lunow v. City of Oklahoma City*, for example, the Tenth Circuit stated that:

> The affidavits from the five activists assert, in effect, that union activity is a detriment to firefighters' careers in the Department. But these assertions are entitled to no weight on summary judgment, because they are conclusory, without providing any factual basis for the conclusions. "To survive summary

> judgment, nonmovant's affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient." *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) (internal quotation marks omitted); *see also Tavery v. United States*, 32 F.3d 1423, 1427 n.4 (10th Cir. 1994) ("Under Fed. R. Civ. P. 56(e), only statements made on personal knowledge will support a motion for summary judgment; statements of mere belief must be disregarded." (internal quotation marks omitted)).[1]

61 Fed. Appx. 598, 607 (10th Cir. 2003). The court finds that its prior ruling was neither clearly erroneous nor manifestly unjust. The court has already discussed the principle of Rule 56(e) and believes it was correctly applied in the May 14 Order to exclude evidence outside plaintiff's personal knowledge.

In the May 14 Order, the court also determined that plaintiff's testimony was impermissible under Federal Rule of Civil Procedure 26(a)(2), because the data upon which plaintiff relied was outside her personal knowledge. As the court noted, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602.

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[1]Moreover, the passage of C.J.S. cited by plaintiff in its Motion to Alter Judgment supports the conclusion that the court may exclude improperly supported affidavits from its consideration of a motion for summary judgment:

> Although it has been held that ordinarily it is the better and safer practice for the court to defer action on the admission or rejection of evidence until a proper objection is made by the party interested in having the evidence excluded, nevertheless the court is not bound to hear and determine the cause on improper evidence but, in the exercise of its right to control and regulate the conduct of the trial, may exclude evidence offered by a party on its own authority, without a motion to strike or objection made by the opposing party, which is wholly incompetent or inadmissible for any purpose, even though no objection is interposed to such evidence.

88 C.J.S. § 253 (2001).

Plaintiff argues the proffered testimony was not "expert testimony" because plaintiff merely compiled data that existed in defendant's records. Plaintiff opines throughout her Declaration as to the audit results she compiled, attached as Exhibit 1 to Plaintiff's Declarations and Exhibits filed in Opposition to Defendant's Motion for Summary Judgment (for example, at paragraph 37: "Without the poor Leakage numbers generated in Mr. Nagle's department, RPI would have averaged 1.98% Leakage in the last three audits conducted at RPI, which exceeds the audit goal and is better than the average leakage of 3.39% found in the 103 audits conducted by Farmers in 2000 and 2001."). Further, regardless of whether plaintiff rendered an opinion, she did rely upon the specialized knowledge of a person who is familiar with auditing principles - testimony upon which Federal Rule of Evidence 702 imposes a special gatekeeping obligation upon a trial judge to determine whether that proffered expert testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-95 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148-49 (1999).

Finally, it is important to note that the court set forth alternative bases for declining to find pretext. In particular, the court noted that, "in determining whether a defendant's allegations of a plaintiff's unsatisfactory job performance are pretextual, the court cannot rely upon plaintiff's own assessment of her performance." (May 14 Order at 14). Further, the court noted that defendant had relied upon other criteria outside the statistics in its decision to terminate plaintiff.:

> [P]laintiff received substandard evaluations on several audits and defendant pointed to other deficiencies in plaintiff's performance beyond the audit results themselves as factors considered in the decision to terminate plaintiff. Moreover, plaintiff has not controverted defendant's statement that it had a policy against terminating an employee for failing just one audit. Without evidence indicating the number of negative audits that each employee

> received in comparison to plaintiff, there is no basis for the court to conclude that the other employees were treated more favorably than plaintiff.

(*Id.* at 16).

The court finds that plaintiff has failed to show that the May 14 Order reflected clear error or manifest injustice. Plaintiff's Motion to Alter or Amend Judgment is denied.

IV. Order

IT IS THEREFORE ORDERED that plaintiff's Motion to Alter Judgment (Doc. 67) is denied.

Dated this 30th day of July 2003, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge